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IN THE
Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET. AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NORTHWEST ENVIRONMENTAL DEFENSE CENTER IN SUPPORT OF RESPONDENTS

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27 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERST OF AMICUS CURIAE.....1

SUMMARY OF ARGUMENT.....1

ARGUMENT.....3

I. THE TEXT AND STRUCTURE OF THE CLEAN AIR ACT GIVE THE EPA AUTHORITY TO ISSUE ORDERS PROHIBITING CONSTRUCTION OF A FACILITY WHICH DOES NOT CONFORM TO THE REQUIREMENTS OF THE PSD PROGRAM.....3

A. *The plain language of the Clean Air Act gives EPA authority to oversee the PSD program*.....3

B. *EPA's oversight authority extends to a BACT determination*.....4

C. *EPA correctly exercised its oversight authority in determining that ADEC's BACT analysis was deficient*.....8

D. *The remedy for any shortcoming in EPA's exercise of authority is to remand the case to the Ninth Circuit*.....9

II. THE POLICIES OF FEDERALISM AND PRACTICAL EXPERIENCE SUPPORT EPA'S CLEAN AIR ACT OVERSIGHT AUTHORITY ...11

A. *The Clean Air Act can only work with strong EPA oversight; any attempt to curtail that oversight would only reverse the current progress towards attaining the goals of the Act* 11

B. *If it is true that the country is in need of increased energy capability, that fact only argues more strongly for EPA oversight of the Act* 15

C. *Past experience, public health and public interest indicate that federal oversight authority is necessary if the goals and purposes of the Act are to be respected* 16

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

American Trucking Ass'ns, Inc. v. U.S.E.P.A., 283 F.3d 355 (D.C. Cir 2002) 16

Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984) 4,9

Christensen v. Harris County, 529 U.S. 576 (2000) 10

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 5,9

New York v. United States, 505 U.S. 144 (1992) 12

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 10

United States v. Mead Corporation, 533 U.S. 218 (2001) ...10

Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001) 16

Statutes

42 U.S.C. § 7401(b)(3) 7
42 U.S.C. § 7413(a)(5) 3
42 U.S.C. § 7413(a)(5)(A) 8
42 U.S.C. § 7470(5) 7
42 U.S.C. § 7473 6
42 U.S.C. § 7475(a)(1) 7,9
42 U.S.C. § 7475(a)(2) 7
42 U.S.C. § 7475(a)(4) 5,7,9
42 U.S.C. § 7475(d)(1) 7
42 U.S.C. § 7476 6
42 U.S.C. § 7476(c) 7
42 U.S.C. § 7476(d) 7
42 U.S.C. § 7477 4,6,8
42 U.S.C. § 7479(3) 4

Rules

56 Fed. Reg. 34202 (1991) 10
61 Fed. Reg. 38250 (1996) 10
64 Fed. Reg. 64023 (1999) 10
66 Fed. Reg. 61286 (2001) 10

Regulations
40 C.F.R. § 52.96(a).....6

Legislative Materials
H.R. Rep. No. 95-294 (1977).....14
S. Rep. No. 95-127 (1977).....14

Other Authorities
Adler, Jonathan H., *The Green Aspects of Printz: the Revival of Federalism and Its Implications for Environmental Law*, 6 Geo. Mason L. Rev. 573 (1998).....12,13

Benedick, Richard *Ozone Diplomacy 2* (1998).....16,17

Dickey, Jefferson H., M.D., *No Room to Breathe: Health Effects of Criteria Air Pollutants from Power Plants 2002*.....16

EPA's *Final Report to Congress on Benefits and Costs of the Clean Air Act, 1990-2010* 18

EPA's *New Source Review Workshop Manual* (1990).....10

Johnson, Dr. Barry L., Testimony before the Senate Environment and Public Works Committee, March 12, 2002.....16

Sarnoff, Joshua D., *The Continuing Imperative (but only from a National Perspective) for Federal Environmental Protection*, 7 Duke Envtl. L. & Pol'y F. 225 (1997) 13

Texas Air Quality Study 2000.....17

Williams, Douglas R., *Cooperative Federalism and the Clean Air Act: a Defense of Minimum Federal Standards*, 20 St. Louis U. Pub. L. Rev. 67 (2001).....12,13,14,15

INTEREST OF AMICUS CURIAE

The Northwest Environmental Defense Center (NEDC or Amicus) is an independent, non-profit organization working to protect the environment and natural resources of the Pacific Northwest.[1] NEDC's work includes providing legal support to individuals and grassroots organizations with environmental concerns, and engaging in litigation independently or in conjunction with other environmental organizations to ensure that the Nation's environmental laws are properly enforced.

As part of our mission, NEDC seeks to maintain or restore healthy air, water, and ecosystems on behalf of our members who live primarily in the Pacific Northwest, but who also reside in other parts of the country. We believe that the Environmental Protection Agency (EPA or Administrator) plays a vital role in enforcing the Nation's environmental laws, thus moving us closer to achieving our goal of a healthy environment.

SUMMARY OF ARGUMENT

The enforcement authority given to EPA under the Clean Air Act (CAA, or Act) allows EPA to oversee best achievable control technology (BACT) determinations made by the States under the Prevention of Significant Deterioration (PSD) program. Using the principles of statutory interpretation in the opinion below, the Ninth Circuit held that EPA had correctly exercised this authority

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[1] Counsel for the parties have consented to the filing of this amicus curiae brief, and the letters of consent are being filed with this brief. Pursuant to Supreme Court Rule 37.6, Amicus states that no counsel for a party has authored this brief in whole or in part. No person or entity other than amicus or its members has made a monetary contribution to the preparation and submission of this brief.

in its issuance of an order preventing new construction at Cominco's Red Dog Mine. EPA issued its order in spite of the fact that the Alaska Department of Environmental Conservation (ADEC, State, or Alaska) had issued a permit for the construction to go forward under the State's PSD program. EPA objected to the issuance of the permit on the basis that the State had not offered a reasoned justification for its determination that Low NOx was BACT for the facility rather than Selective Catalytic Reduction (SCR).

The statutory provision which gives the State the authority to make a BACT determination does not operate in isolation, but must be read in conjunction with the rest of the Act. In looking at the CAA as a whole, and particularly at the PSD provisions, a great deal of authority is given to EPA to implement guidelines under the PSD program and to ensure that the guidelines are properly carried out. Various provisions of the Act allow for EPA's input at the individual permit level. As the BACT determination is a major factor in the implementation of the PSD program, it would be anomalous for EPA to have so much PSD authority, but have no right to oversee a State's BACT analysis.

If EPA has erred at all, it is perhaps in not having promulgated its guidelines in the form of a final rule. If this is the case, then the remedy is for EPA to undertake formal rulemaking.

The principles of cooperative federalism outline the proper roles of the States and EPA in implementing the regulatory scheme of the CAA. A State, if it chooses, has the primary responsibility to implement the PSD program within its borders. EPA's role is to ensure that the State's implementation of the program is in accord with the policies and purposes mandated by the Act.

Although the State may be in a better position to evaluate the unique factors involved in a particular permit decision, the State is also subject to conflicts of interest which may cloud its judgment. EPA's distance from the situation can serve to make it more objective in its technological and scientific determinations. Furthermore, EPA's central position allows it to serve as a clearinghouse for the huge amounts of information that must be assembled and disseminated.

Past performance of the States under the Act led Congress to give EPA increasing authority in the successive amendments to the Act. In view of the continuing revelations about the health effects of the pollutants regulated by the CAA, the evolving science and technology, and the Nation's failure to achieve the goals and purposes of the Act, a strong oversight role for EPA is essential.

ARGUMENT

I. THE TEXT AND STRUCTURE OF THE CLEAN AIR ACT GIVE THE EPA AUTHORITY TO ISSUE ORDERS PROHIBITING CONSTRUCTION OF A FACILITY WHICH DOES NOT CONFORM TO THE REQUIREMENTS OF THE PSD PROGRAM.

A. *The plain language of the Clean Air Act gives EPA authority to oversee the PSD program.*

Section 113(a)(5) of the CAA gives EPA authority to enforce the provisions of the PSD program. 42 U.S.C. § 7413(a)(5). Section 167 of the Act goes even further and mandates that the Administrator take *some* measures to prevent construction or modification of a major emitting

facility which does not meet the requirements of the PSD program.[2] 42 U.S.C. § 7477.

The present dispute revolves around whether this authority extends to a determination of BACT for a particular facility, and, if so, in what manner the authority should be exercised. In light of the ambiguity in the CAA provisions, EPA, the agency charged with administering the Act, is entitled to deference in its interpretation of the statute. *See Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-843 (1984).

B. *EPA's oversight authority extends to a BACT determination.*

The Ninth Circuit, in the opinion below, held that EPA had the ultimate authority in resolving a question of State compliance with BACT requirements, based on the plain language and legislative history of the Act. Pet. App. 1a, *et.seq.*

The statute provides roles for both the State and EPA in a determination of what constitutes BACT for a facility. At first glance, the CAA might appear to give all authority for determining BACT to the State in its definition of the term. 42 U.S.C. § 7479(3). That definition specifies that BACT is an emission limitation which the "permitting authority, on a case-by-case basis ... determines is achievable for such facility ...." *Id.* However, the canons of statutory construction and this Court's opinions dictate that statutory

[2] Petitioner and Respondent have ably and amply analyzed these provisions and the relevant caselaw. In keeping with Rule 37.1, Amicus attempts to avoid completely or state in concise form those arguments already addressed by the parties. Amicus apologizes for any inadvertent duplication of arguments or analysis.

language is not viewed in isolation. The Court has summarized its prior holdings on this subject as follows:

> The words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (internal citations and quotations omitted). It is true, as Petitioner claims, that the Act clearly gives the permitting authority primary responsibility for determining what constitutes BACT at a particular facility for each regulated pollutant. 42 U.S.C. § 7475(a)(4). But primary responsibility does not mean sole responsibility, or even ultimate responsibility.

An analogy may serve to illustrate how the State can be deemed to have the primary responsibility, while EPA retains the ultimate oversight authority. The situation is similar to a public corporation run by a Chief Executive Officer (CEO) and overseen by a Board of Directors. The CEO has the primary responsibility for day to day operations and reporting to the Board. The Board sets policy, and makes and oversees the major business and financial decisions. As long as there are no problems, the Board does not get involved in the day to day operations. However, if the CEO begins to operate contrary to corporate policy, thereby overstepping his or her boundaries, the Board will step in to take control and put things back on track.

Certain provisions of the Act give authority to the State, while others give authority to EPA, thus defining the roles of each. Under the CAA, the permitting authority, usually a State, but sometimes the federal government, a local agency, or a tribe, serves in the role of the CEO. The EPA fills the

role of the Board. As long as the permitting authority is operating in harmony with the Act and its implementing regulations, then EPA has no cause to object. However, when the permitting authority contravenes one of the Act's provisions, EPA may, indeed must, step in to correct the error. According to the statute: "The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part …." 42 U.S.C. § 7477. (*See also* discussion of cooperative federalism, *infra*.)

In this case, the permitting authority is the State of ADEC, because Alaska's State Implementation Plan (SIP) contains a PSD permit program, approved by EPA in 1983. 40 C.F.R. § 52.96(a). Therefore, ADEC does indeed have primary responsibility for the implementation of the PSD program in the State.

On the other hand, certain sections of the Act indicate that EPA, in addition to setting broad guidelines and standards, has the responsibility for ensuring that individual permit decisions are in keeping with PSD program regulations and policies. Other sections of the Act indicate that EPA also has the authority to promulgate regulations governing the determination of BACT.

While Congress, in Section 163, described in great detail the increments and ceilings governing sulfur oxide and particulate matter emissions, Section 166 only gives broad direction to EPA's regulation of the remaining criteria pollutants, including nitrogen oxide (NOx), the pollutant at issue here. 42 U.S.C. §§ 7473 & 7476. For instance, Section 166 directs the Administrator to provide specific measures for carrying out the goals and purposes of Sections

101 and 160 of the Act. 42 U.S.C. § 7476(d). One of these purposes is to provide technical and financial assistance to State and local governments in the execution of their air pollution control programs. 42 U.S.C. § 7401(b)(3). Another purpose is to assure that PSD permit decisions are made only after "careful evaluation of all the consequences of such a decision …." 42 U.S.C. § 7470(5). Without the ability to oversee a State's BACT determination, EPA would be hard-pressed to carry out this congressional mandate. Concerning the promulgation of regulations governing these remaining criteria pollutants (including NOx), EPA is directed to provide, among other things, "a framework for stimulating improved control technology …." 42 U.S.C. § 7476(c). EPA's "top-down" approach for determining BACT would appear to fulfill these mandates of Congress.

Finally, Section 165 further signals EPA's involvement at the individual permit level. It provides that no facility may be constructed unless "the proposed permit has been subject to a review in accordance with this section, [and] the required analysis has been conducted in accordance with regulations promulgated by the Administrator …." 42 U.S.C. § 7475(a)(2). This provision explicitly gives the Administrator the authority to promulgate regulations governing the analysis of the preconstruction process under the PSD program. This same section indicates that the BACT determination is to be part of that analysis. 42 U.S.C. § 7475(a)(4). Section 165 also mandates: "Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such a State and provide notice to the Administrator of every action related to the consideration of such a permit." 42 U.S.C. § 7475(d)(1). Unless Congress expected the EPA to actively oversee the program at the individual permit level, it would make no sense to require the State to submit such a

thorough and timely account of the permit process to the EPA.

Alaska's interpretation of the statute would relegate EPA to the role of an archivist. Alaska suggests that, other than permits that violate the increments, EPA's objection is proper only when the State fails to include any BACT limitation in a PSD permit or fails to issue a permit at all. Pet. Brief 25. Accordingly, EPA's role in overseeing BACT and other permit determinations would simply be that of a clerk, checking to make sure all the blanks were filled in, but not being concerned about the contents.

C. *EPA correctly exercised its oversight authority in determining that ADEC's BACT analysis was deficient.*

The issuance of an administrative order preventing construction or modification of a major emitting facility is in keeping with the enforcement options allowed by the Act. This is the method EPA chose to correct the problem it perceived in Cominco's permit. The provisions governing enforcement by EPA specifically mention an administrative compliance order as a means of halting construction or modification of a facility that does not comply with the requirements of the PSD program. 42 U.S.C. §§ 7413(a)(5)(A) & 7477.

Alaska's interpretation strips the BACT provision of its significance. Nothing in the language or structure of the statute limits EPA's oversight authority only to those permits that violate the allowed increments. Pet. Brief 27. Nor do the terms or scheme of the Act allow the permitting authority to substitute an alternate technology regime for BACT, even if the alternate regime results in lower emissions. Pet. Brief 42. If Congress had intended either result, there would have

been no need for a BACT provision. To limit EPA's objections to permits which violate the allowed increments, all Congress would have needed to mandate is that no permit may violate the increments. Similarly, instead of the BACT prerequisite for PSD construction, the statute would call for the control technology or combination of controls which results in the lowest overall emissions for the facility. But Congress included in the PSD program a requirement that permits issued under that part force the facility to use the "best achievable control technology." 42 U.S.C. 7475(a)(1)&(4). Alaska's reading of the statute renders the BACT provision superfluous, violating the dictate that a statute be interpreted so as to fit all parts into "an harmonious whole." (See *Brown & Williamson*, supra.)

D. *The remedy for any shortcoming in EPA's exercise of authority is to remand the case to the Ninth Circuit.*

Despite the fact that EPA's interpretation of BACT protocol has not been issued as a final rule, it is still entitled to deference. As long as it is reasonable, EPA's longstanding and consistent interpretation of the CAA is entitled to deference under the *Chevron* doctrine. *Chevron*, 467 U.S. at 842-843. Additionally, the Court has found the agency entitled to deference when it is attempting to reconcile competing policies or when the regulatory scheme is technical and complex. *Id.* at 865. This case involves the very same complex regulatory scheme (CAA) and competing policies (reducing air pollution versus economic growth) that were at issue in *Chevron*. Logically, EPA should be accorded the same deference in this case as it was in *Chevron*.

However, the Court has recently indicated that the failure of Congress to delegate general authority to the

agency or the manner in which an agency exercises its statutory authority may affect the measure of deference to which an agency rule is entitled. *United States v. Mead Corporation*, 533 U.S. 218, 237 (2001). More specifically, the Court has indicated that interpretations contained in opinion letters, policy statements, agency manuals, and enforcement guidelines do not warrant the *Chevron*-style deference that would be accorded to formal adjudication or notice-and-comment rulemaking. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Even if these interpretations do not warrant *Chevron*-style deference, they are still entitled to deference to the extent they are persuasive. *See generally, Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The instances in which EPA has issued guidelines for a BACT determination seem to fall on both sides of the line. Regarding EPA's interpretation of BACT's objective standards, a Legal Opinion by EPA's Office of General Counsel states that: "In the case of a decision applying best available control technology (BACT) under Section 165(a)(4) for PSD, if a State has met all procedural norms, considered all available control technologies, and given a reasoned justification of the basis for its decision, EPA has no grounds on which to challenge a final substantive State decision that does not violate such objective standards." Pet App. at 12a. Another source of EPA guidelines, delineating the "top-down" method, is EPA's *New Source Review Workshop Manual* (1990). Pet App. 13a. Interestingly, the "top-down" approach has been the subject of a proposed settlement (*See* 56 Fed. Reg. 34202 (1991)), a proposed rule (*See* 61 Fed. Reg. 38250 (1996)), and several Unified Agendas (*See* e.g., 64 Fed. Reg. 64023 (1999), 66 Fed. Reg. 61286 (2001)), but has not yet been published as a final rule. Finally, the "top-down" approach has been addressed in numerous policy memorandums [sic], guidance documents,

court cases, and administrative appeal decisions. J.A. at 175-176.

To give the ultimate authority concerning the validity of a BACT decision to the permitting authority would contravene the intent of Congress. As discussed above, Congress has repeatedly indicated its intent that EPA should have authority over the PSD program. Ultimately, it is the BACT determination which drives the PSD engine. Without the ability to oversee a BACT determination, EPA's PSD enforcement authority amounts to very little. Therefore, if the Court finds that EPA's exercise of its PSD authority thus far is not entitled to *Chevron*-style or even *Skidmore*-style deference, the case should be remanded with an order that EPA undergo notice-and-comment rulemaking to formalize its BACT approach.

As ADEC has not objected to EPA's "top-down" approach, and indeed purported to follow that approach in the Cominco permit decision, a remand would not affect the outcome of the case below. ADEC only questioned EPA's authority to oversee ADEC's permitting decision. The Ninth Circuit correctly held that EPA has the authority to decide whether a State has complied with the BACT requirements of the Act and the State's SIP, and concluded that EPA's exercise of that authority in this case was not arbitrary and capricious.

II. THE POLICIES OF FEDERALISM AND PRACTICAL EXPERIENCE SUPPORT EPA'S CLEAN AIR ACT OVERSIGHT AUTHORITY.

A. *The Clean Air Act can only work with strong EPA oversight; any attempt to curtail that oversight would only reverse the current progress towards attaining the goals of the Act.*

Many federal statutory schemes are based on th e system of cooperative federalism. *New York v. United St ites*, 505 U.S. 144, 167 (1992). Under this system, Congress may use a variety of methods to encourage the States to reg ulate in a particular manner. *Id.* One method is to attach con ditions to the receipt of federal funds. *Id.* A second metho d, where Congress has authority to regulate private activity, s to offer States a choice between implementing the program themselves, according to minimum federal standa ds, or of having a federally-run program implemented in the State. *Id.* The CAA is one example of a statutory scheme uti izing the second method.

In a State which decides to implement its own program, the scheme amounts to a shared power or partn ership of sorts. As in any partnership, a certain amount of tension is bound to exist as to who is going to be the domina t partner. It would be virtually impossible to have an equal pa rtnership; when a disagreement arises, somebody is going o have to exercise the final authority.

Reasonable arguments can be made on beha f of each partner as to why they should fulfill the dominant role. On the States' side of the debate are the ideas that the State is in a better position to respond to unique local cond tions and can allocate resources more efficiently. D uglas R. Williams, *Cooperative Federalism and the Clean Air Act: a Defense of Minimum Federal Standards*, 20 St. Louis U. Pub. L. Rev. 67, 70 (2001). Likewise, the idea of forcing States to pay for regulations imposed on them by the federal government (unfunded mandates), and find ings that Americans increasingly favor regulation at the State and local level, argue for the State fulfilling the dom inant role. Jonathan H. Adler, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6

Geo. Mason L. Rev. 573, 580-582 (1998). Factors supporting federal dominance are the inclination of pollution to cross state boundaries, leading to disputes between States, and the benefits to be gained from centralizing the information collection and dissemination necessary with such complex scientific and technical issues. Williams, *supra* at 97-106. Also favoring federal regulation are the race-to-the-bottom theory in which States lower environmental standards in an attempt to attract business, and the idea that States will not regulate to the standards desired by the majority of State residents because of the greater influence of the regulated entities on State authorities. *Id.* at 107-112.

Studies and polls come to opposite conclusions as to who is the preferred regulator in the popular arena, States or the EPA. A 1996 national poll showed the majority of Americans favor state and local environmental regulation. Adler, *supra* at 582. Conversely, another author indicates that a "supermajority" of Americans wants to preserve and even expand federal environmental regulatory authority. Joshua D. Sarnoff, *The Continuing Imperative (but only from a National Perspective) for Federal Environmental Protection*, 7 Duke Envtl. L. & Pol'y F. 225, 319 (1997).

Two elements, at least, are definite with regard to CAA implementation. First, over the past three decades, there has been substantial resistance on the part of the States, the regulated community, *and* the EPA to expending the resources necessary to implement the standards of the Clean Air Act. *Id.* at 307 (emphasis added). Second, the history of the CAA and its amendments shows a progressive increase in the enforcement power of the federal government.

The legislative history of the Act demonstrates that Congress considered the positions and interests of both the

States and EPA in implementing the program, and divided authority between the two. The Ninth Circuit opinion gives an overview of the amendments and legislative history of the Act that delegate increasing authority to the federal government. Pet. App. 9a-10a. The 1970 amendments were intended in part "to assure that the requirements of the Act would be met if the States failed to adopt, implement, or enforce the necessary measures." H.R. Rep. No. 95-294, at 326 (1977).[3] Congress recognized the mechanics of the race-to-the-bottom theory and the pressure that was exerted on States by industry's threat to locate to more permissive States. *Id.* at 136-37.[4] Congress provided for federal oversight to protect States that wanted to maintain clean air. *Id.* As Petitioner points out, the BACT decision was recognized to be a key determination, and the committee placed that responsibility with the State, giving it broad flexibility to interpret the provision. S. Rep. No. 95-127, at 31 (1977). Also significant, however, was Congress' view of the Administrator's role in monitoring State actions: "The Administrator thus could go to court to stop a permit for activities which would exceed increments of pollution or which otherwise did not comply with the requirements of [PSD], *including use of best available control technology*." *Id.* at 12 (emphasis added).

In spite of the increased federal enforcement authority, the States' costs of noncompliance with federal mandates still are not likely to be very high. Williams, *supra* at 88. A 1988 study by the General Accounting office indicated that State and local officials were reluctant to implement measures which might have inhibited economic development or altered life-styles. *Id.* at 87. Because of the lackluster progress under the 1977 amendments of the Act,

[3] The Ninth Circuit attributes this to S. Rep. 95-127, at 326 (1977).
[4] This is also attributed to S. Rep. 95-127, at 136-7.

Congress implemented a "milestones program" designed to evaluate progress towards emissions reduction targets in nonattainment areas. *Id.* at 88-89. Under this program, the States were supposed to demonstrate their progress to EPA. *Id.* However, the innovative mechanisms of the 1990 amendments have not been implemented or have been ineffective, and the States have not been held accountable for these shortcomings by EPA. *Id.* at 90.

Further impetus for continued or enhanced EPA oversight derives from the fact that statistical data show an inability to meet health standards under current criteria. Recent studies indicate that the original standard for ozone (of which NOx is a precursor) is not sufficient to protect public health. *Id.* at 68. All in all, though air quality has improved since the inception of the Act, there still remains a long way to go in achieving the goal of enhanced air quality. *Id.* at 67. If anything, EPA oversight of the CAA needs to be increased, not lessened.

B. *If it is true that the country is in need of increased energy capability, that fact only argues more strongly for EPA oversight of the Act.*

Although the Center for Energy and Economic Development (CEED) (Petitioner's Amicus) argues that the anticipated increased demand for energy should dictate that EPA stand aside in order to avert an energy crisis, in reality the increased demand also increases the need for EPA oversight. Logically, the 25% increase in energy generating capacity that CEED deems necessary would result in a corresponding increase in air pollution. As stated above, the previous standard for ozone was inadequate to meet public health requirements. The new standard promulgated by EPA in 1997, although an improvement, may not be sufficient to protect public heal h and also is far from being implemented.

See generally Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001), *American Trucking Ass'ns, Inc. v U.S.E.P.A.*, 283 F.3d 355, (D.C. Cir 2002), and Williams *supra* at 68. Furthermore, recent studies indicate that chronic exposure even to low levels of pollutants, including NOx, may have serious health effects, especially in children. *See* Testimony of Dr. Barry L. Johnson before the Senate Environment and Public Works Committee, March 12, 2002 <http://www.senate.gov/~epw/107th/Johnson_031202.htm>. *See also* Jefferson H. Dickey, M.D., *No Room to Breathe: Health Effects of Criteria Air Pollutants from Power Plants 2002* <http://psr.igc.org/nrtb-new-rpt1.htm>. Caution dictates that everything possible should be done to minimize the increase in pollutants due to increased energy generating capacity so that the corresponding health impacts are minimized. EPA is in the best position to ensure that the construction of these new generating facilities is performed in a manner to reduce these emissions.

C. *Past experience, public health, and public interest indicate that federal oversight authority is necessary if the goals and purposes of the Act are to be respected.*

Industry, although capable of great innovation, has a tendency to resist change, even change which is ultimately economically beneficial. One illustration of this is the phase-out of ozone depleting substances under the Montreal Protocol. At first, producers of ozone depleting substances (ODSs), were extremely resistant to their phase-out and argued that any control measures would damage them economically. Richard Benedick, *Ozone Diplomacy 2*, 57 (1998). However once manufacturers saw the opportunity for a competitive advantage, they led the effort to develop chemical alternatives to ODSs. ODS users likewise were able to alter processes and products in a manner that saved

them money through the reduction of solvent use and waste disposal costs. *Id.* at 104. Ultimately, the original dire predictions of manufacturers and users failed to materialize.

Without strong regulation and oversight, the technology forcing mandates of the Act will not be fulfilled. The status of the implementation of the PSD and other CAA programs is analogous to the situation experienced at the inception of the Montreal Protocol. Industry will likely resist every effort to implement new or more stringent emissions control technology whenever that technology costs more. And it is understandable that industry would do just that, as its focus is to maximize profits. Without some sort of leverage, industry is not likely to move towards new technology. States cannot be counted on to fulfill this role because of the conflict of interest inherent in their need to attract industry for the benefit of their residents. EPA oversight is needed to provide that leverage, and ensure that the CAA and the innovations in technology it mandates are implemented.

Another illustration of the need for EPA oversight comes from the recent Texas Air Quality Study 2000. <http://www.utexas.edu/research/ceer/texaqsarchive/pdfs/EXEC_SUMMARY_Nov_02.pdf>. Texas learned that the ozone modeling assumptions it had been using for the past 30 years were incorrect. This experience emphasizes the need for a strong centralized process of information gathering and dissemination mentioned in the Williams article. Although there is room for innovation by the States, the EPA serves as an overseer to keep the States from going astray in their scientific calculations. EPA serves to ensure that innovations by the States are truly innovations and not merely empty promises of innovation.

While it is true that industry produces benefits for all citizens, there are other economic benefits and costs to

consider. One aspect of the economic analysis that is often overlooked is that savings for industry often result in other sectors of society bearing greater costs. For instance, EPA reports to Congress (required by Section 812 of the Act), have estimated that, by 2010, the economic benefits derived from the 1990 amendments to the Clean Air Act will total around $127 billion (mainly in health benefits), more than four times the cost of achieving those benefits. Furthermore, EPA estimates that there are many more benefits that are not presently quantifiable, such as benefits to crops and ecosystems and further health benefits. *See* EPA's *Final Report to Congress on Benefits and Costs of the Clean Air Act, 1990-2010* <http://www.epa.gov/oar/sect812/> & <http://www.epa.gov/history/topics/caa90/10.htm>.

Three of the arguments made by Petitioner strongly appeal to notions of common sense and fair play at first glance, but fail to withstand closer scrutiny. For example, Cominco's idea to use Low NOx on all seven generators, even those not requiring BACT analysis, has appeal because it could result in lower overall emissions than if SCR were used on only the two generators, MG-5 and MG-17. (Getting lower overall net emissions also requires the assumption that the two generators with SCR controls would be placed in standby mode; if all generators were run at operating capacity, then even this configuration would result in an increase of 79 tons per year.) J.A. 86-87. However, even the possible emissions reductions forecast under this scheme may be short-lived.

If Cominco decides to expand production further, then the net reduction in overall emissions quickly evaporates. For instance, if Cominco decided to install one more generator identical to MG-17 and were able to use Low NOx on that generator instead of SCR, the result would be a net increase of approximately 500 tons per year of nitrogen

oxide (NOx) emissions. J.A. 110, 198. Low NOx is the baseline control for the new generators, therefore using Low NOx as BACT on a new generator results in an emission rate of 530 tons per year and a reduction of 0%. (Low NOx results in emissions reductions on the older generators because they went online with lesser controls or none at all.) If Cominco expanded with two new generators, the increase in emissions using Low NOx would be 1060 tons per year; with three new generators 1590 tons per year, etc. On the other hand, SCR control as BACT would result in an emission rate of only 53 tons per year per generator, a reduction of 90% for each new generator installed.

In fact, the idea of expansion is not so far-fetched. Cominco originally planned a greater output with generator MG-5, but then reduced the emission increases from MG-5 in order to avoid modification and BACT review. J.A. 197. Presumably, if BACT at this time is determined to be SCR, it would be difficult to find that a lesser control is BACT for any future generators. Likewise, a determination that Low NOx is BACT for the current modification makes it that much easier for Cominco (or a similar facility) to obtain a determination that Low NOx is BACT in the future.

Secondly, Petitioner's analysis of the reasons for giving a State some flexibility in its BACT determination is similarly flawed when applied to the facts of this case. Petitioner refers to a situation in which a State, concerned about the impact of increased costs on a critically important employer, decides to allow that employer to implement a less stringent, less costly technology, presumably to keep that employer from leaving the area. Pet. Brief 24. This appears to be precisely the reason for allowing a less stringent control technology for Cominco – the fact that the Red Dog Mine offers employment in a remote area with few other opportunities for employment. *Id.* at 9-13. The flaw in this

argument is that there is no danger here that the mine will relocate; the zinc deposits are in the ground and must be mined where they are found.

Thirdly, Cominco and Alaska asserted that the increased costs of using SCR would reduce the mine's competitiveness on the world market and have adverse economic impacts. Ordinarily, these factors might provide a reasoned justification for allowing a less stringent BACT determination on the basis of economic infeasibility. However, no economic analysis was offered to bolster the claims of economic infeasibility. J.A. 116. Rather, Cominco and Alaska simply relate that Cominco's Red Dog Mine is the largest producer of zinc concentrate in the world and the royalty payments from the mine to the Inupiat shareholders are expected to total $1 billion over the life of the mine. Pet. Brief 8-9. Even if SCR were run on the new generator for 40 years (at a $2.9 million initial capital cost and $635,000/year in operating costs), the total cost of its operation would amount to only about two percent of the expected royalty payment. J.A. 113. Generally, royalty payments are substantially less than the profits expected from a business venture, therefore it is hard to imagine how using SCR could be economically infeasible for Cominco. And, in fact, ADEC found SCR was economically feasible in its preliminary technical analysis. J.A. 84. In its final technical analysis, ADEC admits that Cominco failed to present it with detailed financial information, making analysis of the economic feasibility of SCR impossible, nevertheless, ADEC still allowed a less stringent technology as BACT. J.A. 116.

This all leads directly to EPA's and the Ninth Circuit's logical conclusion that ADEC failed to offer a reasoned justification for its BACT determination. Pet. App 12a-13a. Even if Alaska is correct in its argument that EPA should be

required to show that the State's decision is arbitrary and capricious, the above economic information should suffice to do so. Pet. Brief 36. The burden should then shift to the State to show that its actions were not arbitrary and capricious. On the facts of this case, the State of Alaska cannot meet this burden. As the Ninth Circuit pointed out, Alaska's analysis was "uncomfortably reminiscent of one of the very reasons Congress granted EPA enforcement authority – to protect states from industry pressure to issue ill-advised permits." Pet. App. 16a.

Finally, the desire for certainty in the permitting process, although understandable, fails to support the argument against EPA oversight authority in BACT determinations. Amici States North Dakota, et.al., (States) and National Environmental Development Association, et.al., (NEDA) argue that EPA's intrusion into the State role of determining BACT injects an unacceptable level of uncertainty into the permitting process. States' Brief at 15, NEDA Brief at 11. Indeed, the costs involved in facility construction are great, and uncertainty as to the proper control technology could create a difficult situation for industry if they proceed with construction under an incorrect assumption as to which is the proper technology. However, it could be just as easily argued that the uncertainty stems from EPA's failure to consistently enforce the requirements of the Act as mentioned above. If EPA would strictly enforce the Act and industry could rely on that strict enforcement, that consistency would also provide the desired measure of certainty.

The need for EPA enforcement is now more necessary than ever. Although it is desirable for the State to play the primary role under the system of cooperative federalism, that role is presently strained in many States due to their huge budget deficits. Even if a State may wish to perform its role

in an exemplary fashion, it may not have the capability to do so. As Dr. Barry L. Johnson said in his testimony before Congress, "Now is not the time to gamble with unproven administrative procedures that may set back the progress already made." Although industry seems to look upon EPA as a sword, there are those who look upon EPA as a shield, and breathe easier with EPA's oversight in the tremendously complex process of implementing the Clean Air Act.

CONCLUSION

For the foregoing reasons, the judgment below should be upheld. Short of that, the case should be remanded for further proceedings.

Respectfully submitted,

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